In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–146

BILL R. HUNTER, D/B/A, THE COURIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On October 16, 1972, this Court denied a petition for a writ of certiorari in this case. The petitioner thereafter filed a petition for rehearing, and on January 8, 1973, this Court requested the United States to respond to the petition for rehearing. This memorandum is submitted in response to that request.

1. The petitioner predicates his request for rehearing on this Court's grant of certiorari on December 4, 1972, in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* No. 72–419. The rehearing petition states that the two constitutional issues raised by the petition in *Pittsburgh Press* are "similar, if

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not identical" (Rehearing Pet. 2) to the constitutional questions raised in the certiorari petition in the present case,[1] and this, it is argued, warrants the granting of the petition.

2. One of petitioner's contentions is that, as applied to him, the absolute ban in Title VIII on racially discriminatory housing advertising,[2] when contrasted with the exemption from the Act's coverage for "live-in landlords" with five or fewer units, denies him due process in that he is prohibited from advertising something which it is not illegal to do (Pet. 12–13).[3]

In *Pittsburgh Press* the petition raises, *inter alia*, the question whether it was constitutionally proper to preclude the newspaper from maintaining separate sex-designated employment advertising columns in the absence of proof that employers placing help-wanted advertisements in such columns have, in fact, discriminated in their employment practices (see Petition in No. 72–419, at 3, 14.

In brief, the *Hunter* petition questions the constitutionality of the congressional determination to bar completely all discriminatory housing advertisements without making illegal in the same legislation (see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409) all discriminatory rental practices.[4] The *Pittsburgh Press* petition, on

[1] The certiorari petition here also raised two questions of statutory interpretation which apparently are not renewed in the petition for rehearing. See Petition in No. 72–146, Questions I and VI at pp. 2–3, and pp. 7–8 and 13–14.

[2] Section 804(c) of the Civil Rights Act of 1968, 42 U.S.C. 3604(c).

[3] But see *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409.

[4] See Memorandum for the United States in Opposition in this case, No. 72–146, at pp. 3–4.

the other hand, questions the quantum of proof necessary for the imposition of liability under an "aiding" provision of a local ordinance to be constitutional. Since the present case involves the violation of an explicit statutory prohibition of discriminatory advertising, rather than of an aiding or abetting statute, the due process issues in the two cases are significantly different, and the granting of the petition in *Pittsburgh Press* should not affect this Court's earlier disposition of that aspect of the petition in the present case.

3. However, the petitions in both cases question whether legislative power exists, consistent with the First Amendment, to regulate the publication in newspapers of discriminatory commercial advertising. The Court's decision in *Pittsburgh Press* would ordinarily be rendered this Term; whereas, if certiorari were now granted in the present case, it would not under normal scheduling be argued until next Term. Accordingly, should the Court wish to reconsider in *Pittsburgh Press* the impact of the First Amendment on purely commercial advertising,[5] it may wish to postpone disposition of the present petition for rehearing pending its decision in *Pittsburgh Press*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[5] See *Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000, affirming 333 F. Supp. 582 (D. D.C.), and authorities collected in the opinion below, Pet. App. 6a–7a.

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